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IN THE

# SUPREME COURT OF THE UNITED STATES.

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ALBERT COLLINS, RALPH ATKINS and WENDELL LOVEDAY,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

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## REPLY TO PETITION FOR WRIT OF CERTIORARI.

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The petitioners, Albert Collins, Ralph Atkins, and Wendell Loveday, seek a review of a Tennessee State Supreme Court decision affirming their convictions for burglary for which they were sentenced to serve not less than three nor more than five years in the State Penitentiary.

The decision of the Tennessee Supreme Court was not designated for publication but a copy of the same has been attached to the petition by way of an appendix.

Counsel for the State of Tennessee concedes the jurisdiction of this Court to review a judgment of the Tennessee State Supreme Court affirming a criminal conviction, but it is denied that the requirements for invoking the jurisdiction of this Court on the question of venue raised in the petition have been met in that the question was not presented or passed upon by the Tennessee Supreme Court. It was apparently abandoned by petitioners after the matter was passed upon by the trial court preliminary to the trial.

## QUESTIONS PRESENTED.

1. Whether or not the petitioners were denied due process of law under the Tennessee procedure required by Section 40-402, Tennessee Code Annotated, that accused persons brought before a Magistrate during a session of the grand jury in the county where the offense was committed be bound over to the grand jury without a hearing before the Magistrate or General Sessions Judge, as the case may be.

2. Whether or not the petitioners were denied due process of law by the action of the trial judge after the jury had been sworn and petitioners pleaded not guilty in the criminal proceeding but before any evidence was presented in dismissing one of the jurors, selecting another in his place, and proceeding with the trial.

3. Whether or not the petitioners in this case should have been granted a change of venue because of the publicity given the case in the county prior to trial and because the prosecuting witness, Dr. W. B. Robinson, had performed medical services for 80% of the competent jurors in the county where the offense was committed.

## ARGUMENT.

1. Section 40-402, Tennessee Code Annotated, is as follows:

> "40-402. Binding over to grand jury.—Whenever any person is brought before a justice of the peace of this state upon a warrant for any criminal offense or misdemeanor, if the grand jury of the county where the offense is charged to have been committed is in session, the said justice of the peace shall not try the case, unless the defendant pleads guilty, but shall, if the offense charged is bailable, take bond of the defendant in such sum as now prescribed by law for the offense charged for his appearance before the court in charge of or impaneling said grand jury, from day to day, pending an investigation of said offense by said grand jury. If the case is not bailable, or if the defendant fails to give the bond required, he shall be committed to jail, pending the investigation, the warrant and the bond, if any be given, to be at once transmitted to said court. Provided that this section shall not apply to cases triable under § 40-408."

The Supreme Court of Tennessee has construed this statute on several occasions. Its opinions in **Davis v. State, ex rel.**, 104 Tenn. 553, 58 S. W. 237, and **State ex rel. Wood v. Johnson**, 216 Tenn. 531, 393 S. W. 2d 135, are appropriate in reply to the first question raised by counsel for the petitioners. An excerpt from the first of those opinions at Page 558, Tennessee Supreme Court Reports and Pages 238-239 of the Southwestern Report is as follows:

> "We are of opinion that the object and purpose of the law is to provide that, while the Criminal Court is in session and a grand jury is impaneled

and authorized to act (which they can do at any time until they are discharged), it is the duty of the Justice of the Peace, in bailable cases, to bind over persons accused of crime and arrested therefor to the Court in charge of or impaneling the jury, from day to day, pending an investigation of the offense by said grand jury. When the Court is not in session, and there is no grand jury impaneled, then the Justice shall hear the evidence and try the case and bind over the accused or not, as he may find the facts to justify. In other words, while the Court is in session and a grand jury is impaneled and authorized to act, whether in continuous and daily sessions or not, Justices shall bind persons accused over to the Court without a preliminary investigation; but if the Court is not in session, or there is no grand jury authorized and impaneled to act, then the Justice shall go into preliminary investigation of the facts, and bind or not, as occasion requires. But it is not necessary that the grand jury shall sit continuously, or day after day, but their sessions may be so timed as the business before them demands."

An excerpt from the case of **State ex rel. Wood v. Johnson** at Page 535 of the Tennessee Supreme Court Reports and Page 136 of the Southwestern Report is as follows:

"It is next contended the petitioner was not given a preliminary hearing. By the terms of T. C. A., sec. 40-402, it is provided that, if the grand jury of the county where the offense is charged to have been committed is in session, the magistrate shall not try the case but shall take bond of the defendant, if the offense charged is bailable, for the defendant's appearance before the court in charge of, or empaneling, the grand jury. It is not averred that the Knox County Grand Jury was not at the time in session. See Dillard v. Bomar, 6 Cir., 342 F. 2d 789. This

averment of the petition does not allege a violation of a constitutional right. United States ex rel. Kassin v. Mulligan, 295 U. S. 396, 400, 55 S. Ct. 781, 79 L. Ed. 1501, Dillard v. Bomar, supra."

The United States Circuit Court of Appeals, Sixth Circuit, considered the question thoroughly in the case of **Dillard v. Bomar**, 342 F. 2d 789. An excerpt from Page 790 of that opinion is as follows:

> "We do not find that the Supreme Court has ever held that an accused has a constitutional right to a preliminary hearing. On the contrary, we construe the opinions in Goldsby v. United States, 160 U. S. 70, 73, 16 S. Ct. 216, 40 L. Ed. 343; United States ex rel. Kassin v. Mulligan, 295 U. S. 396, 400, 55 S. Ct. 781, 79 L. Ed. 1501, and Beavers v. Henkel, 194 U. S. 73, 84-85, 24 S. Ct. 605, 48 L. Ed. 882, as saying that an accused has no such constitutional right."

Cases cited and relied upon by counsel for the petitioners, **Anderson v. United States**, 318 U. S. 350, 63 S. Ct. 599, and **McNabb v. United States**, 318 U. S. 330, 77 S. Ct. 510, are not applicable to the present question. They have to do with the taking of confessions from defendants. They do not touch the question of whether or not a defendant in a criminal case has a constitutional right to a preliminary hearing.

2. The twelfth juror was challenged for cause upon the grounds that he had formed an opinion as to the guilt of the petitioners (defendants in the criminal case) because of what he had read and heard in the community regarding the offense. The trial judge, after the witness had stated that he could lay aside any previously formed opinions and decide the case in accordance with the law and the evidence, overruled the challenge for cause. Counsel for the petitioners had used up their peremptory challenges. The indictment was then read in the presence

of the jury. The petitioners pleaded not guilty and the court recessed for lunch. After lunch, the court, having had an opportunity to think more about the matter, excused the juror in question and another was selected in his stead. Counsel for the petitioners immediately began to insist that the procedure had the effect of putting the petitioners in jeopardy and that insistence is still being made for the petitioners.

The Supreme Court of Tennessee dealt with a similar problem in **Green v. State**, 147 Tenn. 299, 247 S. W. 84. The holding in the **Green** case was bottomed upon **Simmons v. United States**, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968; **Logan v. United States**, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429; and **Thompson v. United States**, 155 U. S. 271, 15 S. Ct. 73, 39 L. Ed. 146. After considering these authorities, the Tennessee Supreme Court made the following statement:

> "The general modern rule is that the court may discharge a juror without working an acquittal of the defendant in any case, where the ends of justice, under the circumstances, would otherwise be defeated. 8 R. C. L., p. 153; 16 R. C. L., p. 319."
>
> 147 Tenn. 299, 307, 247 S. W. 84, 86.

3. A motion for change of venue was made on the grounds that the prosecuting witness, Dr. W. B. Robinson, "has treated 80% of the competent jurors available in the county or their close relatives or close friends" and that it would be impossible to obtain a fair trial in the county where the offense was committed and where they were tried. They assign as another ground "the matters surrounding this case have been highly publicized in the Knoxville News-Sentinel and the Knoxville Journal and on the Knoxville television and radio circuits . . ." The order overruling the motion for change of venue recites "the State joined issue on the question of fact after hear-

ing the proof introduced at the hearing and after hearing argument of counsel, the State is of the opinion that the motion for change of venue is not well taken". By this statement it is submitted that the facts alleged to the effect that the doctor had treated 80% of the competent jurors or their close friends and relatives in the county were true and that the case had been highly publicized through the Knoxville news media—newspapers, radio, and television. (It is not shown that Knoxville, Tennessee, is the county seat of Knox County and is forty-six miles from Newport, the county seat of Cocke County, Tennessee, where the case was tried.)

The conclusions resulting from these facts to the effect that the petitioners could not obtain a fair trial, etc., were not admitted to be true, but the ultimate conclusion for the Court itself to determine. The trial judge properly ruled that the jurors were not disqualified because 80% of them or their friends or relatives had been treated by the State's prosecuting witness, Dr. W. B. Robinson; or that the publicity given the suit through the Knoxville news media—newspapers, television, and radio some distance from the county where the case was tried was sufficient to render it impossible for a jury free from bias and prejudice to be selected.

This question relative to a change of venue was raised in the motion for a new trial but abandoned by the time the case reached the Tennessee Supreme Court. Consequently, it was never considered by the Tennessee Supreme Court and for that reason, should not be considered by this Honorable Court. United States Supreme Court Rule 16 (b) is as follows:

> "The Court will review a motion to dismiss an appeal from a state court on the ground that it does not present a substantial Federal question; **or that the Federal question sought to be reviewed was not**

timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

In view of the foregoing, it is insisted by counsel for the State of Tennessee that the writ of certiorari should not issue in this case and that the judgment of the Supreme Court of Tennessee affirming the convictions of the petitioners on a charge of burglary be affirmed.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

**Certificate of Service.**

I certify that I forwarded a copy of this Reply to Petition for Writ of Certiorari to the Honorable William Earl Badgett, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee, on this the 19 day of June, 1967.

Thomas E. Fox,
Assistant Attorney General.